

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
North Pacific International Television, Inc.)	
)	CSR-5735-M
v.)	
)	
DIRECTV, Inc.)	
)	
Request for Mandatory Carriage of)	
KHCV(TV), Seattle, Washington)	

ORDER ON RECONSIDERATION

Adopted: March 15, 2004

Released: March 18, 2004

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. In this Order, we consider a petition for reconsideration of the former Cable Services Bureau's decision ("Initial Order")¹ and, alternatively, a petition for waiver of Section 76.66(c)(3) of the Commission's rules,² filed by North Pacific International Television, Inc. ("North Pacific"), licensee of commercial television station KHCV(TV), Seattle, Washington ("KHCV" or the "station"). The Initial Order denied KHCV's complaint against DIRECTV, Inc. ("DIRECTV") for refusal to carry the signal of KHCV on its satellite system providing "local-into-local" satellite service in the Seattle, Washington market, the designated market area ("DMA") where station KHCV operates. DIRECTV filed an opposition to the petition and KHCV replied.³ For the reasons set forth below, we deny KHCV's petition for reconsideration and the petition for waiver of Section 76.66(c)(3).⁴

II. BACKGROUND

2. Section 338 of the Communications Act of 1934, adopted as part of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"),⁵ requires satellite carriers, by January 1, 2002, to carry upon request all local television broadcast stations' signals in local markets in which the satellite carrier

¹ *North Pacific International Television, Inc. v. DIRECTV, Inc.*, 17 FCC Rcd 879 (2002) ("Initial Order").

² 47 C.F.R. § 76.66(c)(3).

³ DIRECTV filed a motion to accept its late-filed opposition. DIRECTV states that it had no record of being served with a copy of KHCV's petition. After discovering that the petition was filed, the parties mutually agreed to an extension for DIRECTV to file its opposition, with a corresponding extension for KHCV to file its reply. Under these circumstances, we grant DIRECTV's motion.

⁴ Although KHCV has chosen to seek remedial action for non-carriage with the Commission, the Satellite Home Viewer Improvement Act of 1999 also permits KHCV to file a civil action in United States District Court for DIRECTV's refusal to carry its signal. See 47 U.S.C. § 338(a)(2).

⁵ See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

carries at least one local television broadcast signal pursuant to the statutory copyright license.⁶ A station's market for satellite carriage purposes is its DMA, as defined by Nielsen Media Research.⁷ A DMA is a geographic area that describes each television market exclusive of others, based on measured viewing patterns. In November 2000, the Commission adopted rules to implement the provisions contained in Section 338.⁸ For the initial election cycle, broadcast stations were required to notify satellite carriers by July 1, 2001 of mandatory carriage election for carriage to commence on January 1, 2002.⁹ Section 76.66(d)(1)(ii) requires that must carry elections be made in writing and sent to the satellite carrier's principal place of business, by certified mail, return receipt requested.¹⁰

III. DISCUSSION

3. According to the Bureau's Initial Order, KHCV stated that its counsel sent on its behalf to DIRECTV a certified letter on June 19, 2001, return receipt requested, electing mandatory carriage of KHCV on DIRECTV's system serving the Seattle DMA.¹¹ DIRECTV asserted that it had no record of receiving KHVC's must carry election notice.¹² KHCV was unable to provide documentary evidence that it complied with Section 76.66(1)(ii), but instead claimed that the election carriage request was drafted by its attorney who then instructed his administrative assistant to sign the letter on his behalf and send it DIRECTV via certified mail, return receipt requested.¹³ Based on the record, we denied KHCV's request for mandatory carriage because it failed to provide documentary evidence of its request for carriage, in writing, sent to the satellite carrier's principal place of business by certified mail, return receipt requested as required by the rules.¹⁴

4. In its petition for reconsideration and waiver, KHCV requests that the Bureau reconsider its Initial Order and order DIRECTV to begin carriage of KHCV on its system serving the Seattle DMA or, alternatively, waive Section 76.66(c)(3) to allow KHCV to request carriage on DIRECTV's system after the July 1, 2001 deadline.¹⁵ KHCV acknowledges that it was unable to provide documentary proof, such as a date-stamped certified mail receipt demonstrating that its election request was sent to DIRECTV or a certified mail postal card evidencing that the letter had been delivered to DIRECTV.¹⁶ KHCV

⁶ See 47 U.S.C. § 338.

⁷ See 17 U.S.C. § 122(j)(2)(A)-(C); See also *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918, 1934 (2000) ("DBS Must Carry Report & Order"); 47 C.F.R. § 76.66(e) ("A local market in the case of both commercial and noncommercial television stations is the designated market area in which a station is located, and (i) in the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area within the same local market; and (ii) in the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market as the noncommercial educational television broadcast station.").

⁸ See generally *DBS Must Carry Report and Order*, *supra*. The Commission affirmed and clarified its carriage rules in a reconsideration proceeding. See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544 (2001) ("DBS Must Carry Reconsideration Order").

⁹ See 47 C.F.R. § 76.66(c)(3).

¹⁰ 47 C.F.R. § 76.66(d)(1)(ii).

¹¹ See Initial Order, 17 FCC Rcd at 881.

¹² *Id.* at 882.

¹³ *Id.* at 883.

¹⁴ See 47 C.F.R. § 76.66(d)(1)(ii).

¹⁵ Petition at 1.

¹⁶ *Id.* at 2, 5.

instead argues that the Bureau should have attributed more weight to two sworn declarations of individuals who stated that the carriage request was sent to DIRECTV using standard office procedures.¹⁷ KHCV further argues that the failure of an administrative assistant to retain evidence that the carriage request was sent via certified mail does not prove that the request was not properly sent.¹⁸

5. We find that the Bureau fully evaluated and addressed all of the evidence offered by KHCV in its Initial Order. The Bureau previously rejected requests for reconsideration on similar facts where petitioners failed to provide documentary evidence of a request for carriage.¹⁹ As the Bureau stated in its Initial Order, contacting a carrier by certified mail ensures that broadcast stations are able to demonstrate that they submitted their election requests by the required deadline and that they are received by the satellite carrier.²⁰ This method also provides some degree of certainty to satellite carriers that must contend with hundreds of election requests from local stations and must configure their systems according to those requests.²¹ This bright line approach in the Commission's rules was expressly designed to avoid the particular type of argument raised by KHCV.²² Under the Commission's rules, there is a specific mailing requirement for broadcast stations seeking carriage and KHCV's representations regarding its standard office practice were not sufficient to demonstrate that the election request was mailed or received.²³ The Initial Order considered KHCV's evidence, which consisted of the declarations of the attorney who drafted the election request and the supervisor of the administrative assistant who was instructed to mail the election request.²⁴ Because KHCV failed to perfect its carriage request by the required deadline, it is not entitled to mandatory carriage for the duration of the current cycle.

6. KHCV alternatively requests a waiver of Section 76.66(c)(3) of the Commission's rules, which requires that a commercial television station must request carriage by July 1, 2001 for the first election cycle.²⁵ KHCV argues that Section 76.66(c)(3) is an administrative regulation that the Commission can waive because sound administrative procedure contemplates a meaningful opportunity for waiver of agency rules.²⁶ KHCV also argues that grant of its waiver request would serve the public

¹⁷ *Id.* at 2. KHCV submitted declarations from the attorney who drafted the election request and from the supervisor of the administrative assistant who allegedly mailed the documents. No declaration was submitted from that employee. According to the declaration of the supervisor of the employee responsible for mailing the documents, the law firm no longer employs that individual. See Initial Order, 17 FCC Rcd at 884 and n.48.

¹⁸ *Id.*

¹⁹ See *Family Stations, Inc. v. EchoStar Satellite Corporation*, 17 FCC Rcd 8235 (2002), *aff'g* *Family Stations, Inc. v. EchoStar Satellite Corporation*, 17 FCC Rcd 987 (2002); *Family Stations, Inc. v. EchoStar Satellite Corporation*, 17 FCC Rcd 8231 (2002), *aff'g* *Family Stations, Inc. v. EchoStar Satellite Corporation*, 17 FCC Rcd 982 (2002).

²⁰ Initial Order, 17 FCC Rcd at 884.

²¹ *Id.* at 885.

²² *Id.*

²³ *Id.* at 884. The Initial Order also previously distinguished those cases offered by KHCV that standard operating procedure is evidence of mailing. See *United States v. Bowman*, 783 F.2d 1192 (5th Cir. 1986); *United States v. Ledesma*, 632 F.2d 670 (7th Cir. 1980), *cert. denied*, 449 U.S. 998 (1980). In those cases, mailing was accomplished by ordinary mail and there was no requirement that the materials sent be delivered by certified mail. We disagree with KHCV that we should follow the guidance of the federal courts regarding the use of testimony as to office practice, or circumstantial evidence, as sufficient proof of mailing. See Petition at 2, n.2. Under the Commission's rules, there is a specific requirement that election requests be sent by certified mail, return receipt requested. See 47 C.F.R. § 76.66(d)(1)(ii).

²⁴ Initial Order, 17 FCC Rcd at 884.

²⁵ 47 C.F.R. § 76.66(c)(3).

²⁶ Petition at 6.

interest and would be consistent with the intent of Congress when it enacted SHVIA.²⁷ KHCV asserts that DIRECTV has actual knowledge of its carriage request and that the public interest will be served because DIRECTV's 83,000 satellite subscribers in the Seattle DMA would receive the local programming offered by KHCV, the station would avoid suffering economic hardship, and the benefit afforded to Seattle DMA subscribers would outweigh any inconvenience faced by DIRECTV by carrying KHCV.²⁸

7. DIRECTV responds that it is inaccurate to assert that 83,000 satellite subscribers would lose access to local programming because DIRECTV subscribers have access to KHCV as a local over-the-air broadcast station and over local cable systems.²⁹ DIRECTV also argues that KHCV has not substantiated its claim that it will suffer economic hardship by not being able to reach DIRECTV subscribers.³⁰ DIRECTV further asserts that even if KHCV would suffer some economic harm by not being on the same footing as other local broadcasters, such harm was created by its own doing for failing to comply with the Commission's rules by ensuring that its election request was timely sent, received and processed by DIRECTV.³¹ Moreover, DIRECTV argues that it must make decisions concerning the allocation of channel capacity to hundreds of local stations across dozens of local markets, and expend significant resources on the implementation of local channel service in those markets, based entirely on broadcaster compliance with mandatory carriage election deadlines.³² DIRECTV asserts that adding a station after the deadline has passed imposes a number of technical and administrative burdens upon a satellite carrier.³³

8. An applicant for waiver of the rules faces a "high hurdle" and "must plead with particularity the facts and circumstances which warrant such action."³⁴ Furthermore, "the applicant for waiver must articulate a specific pleading, and adduce concrete support, preferably documentary."³⁵ A waiver request assumes the "validity of the general rule."³⁶ KHCV has failed to articulate a basis for waiver that would not render the subject rule meaningless.

9. Granting KHCV's waiver request based on the general assertions contained in its petition would obviate the rule by creating a precedent for waiving the rule any time a party fails to comply. KHCV has cited no special circumstances to distinguish its failure to follow the rules. If the Bureau granted KHCV's waiver request, it would essentially be eliminating the rule requirement. A waiver in such circumstances would create significant uncertainty for all parties involved in carriage disputes and would not serve the public interest. Therefore, KHCV's petition for waiver of Section 76.66(c)(3) is denied.

²⁷ *Id.* at 5; KHCV Reply at 4.

²⁸ Petition at 6.

²⁹ DIRECTV Opposition at 5.

³⁰ *Id.* at 6.

³¹ *Id.* at 7.

³² *Id.*

³³ *Id.*

³⁴ *Wait Radio v. Federal Communications Commission*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd* 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

³⁵ *Id.* at n.9.

³⁶ *Id.* at 1158.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act of 1934, as amended, 47 U.S.C. § 338, and Section 76.66 of the Commission's rules, 47 C.F.R. § 76.66, that the petition for reconsideration and, alternatively, petition for waiver filed by North Pacific International Television, Inc., licensee of KHCV(TV), Seattle, Washington **IS DENIED**.

11. This action is taken by the Deputy Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau